UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

UNITED STATES OF AMERICA	:	
v.	:	2:01-CR-12-01
DONALD FELL	:	

OPINION AND ORDER

On February 1, 2001, the grand jury returned a four-count indictment charging Donald Fell and Robert Lee with, among other offenses, car-jacking resulting in death, in violation of 18 U.S.C. § 2119(3) (Count 1), and kidnapping resulting in death, in violation of 18 U.S.C. § 1201(a) (Count 2). The indictment alleges that on November 27, 2000, Fell and Lee kidnapped Teresca King at gunpoint and stole her car. Fleeing the state of Vermont, they entered the state of New York, where the indictment alleges they battered King to death. On July 8, 2002, the grand jury returned a superceding indictment with the same charges and a notice of special findings. Before the Court is Fell's Motion to Suppress Evidence and Statements (Doc. 48). Fell challenges the initial stop of the vehicle in which he was riding. He also challenges his subsequent arrest and the search of the vehicle. On March 16, 2005, the Court held an evidentiary hearing and heard testimony from Officer Jeff Ross of the Clarksville Police Department. For the reasons that follow, Fell's motion is denied.

I. Findings of Fact

Donald Fell and Robert Lee were apprehended in Arkansas by Officer Jeff Ross of the Clarksville Police Department ("CPD") on November 30, 2000. Clarksville is a small city with a population of approximately 9000 people. Interstate 40, a major highway running across the country, runs through Clarksville's city limits.

When they were apprehended, Fell and Lee were driving a 1996 Plymouth Neon belonging to Norman and Teresca King. Gov. Ex. 2. The Neon was bearing stolen Pennsylvania license plates. At 1:30 p.m. on November 30, 2000, Fell and Lee were in Clarksville at a Phillips 66 gas station. This station was located on Rogers Street next to Exit 58 of Interstate 40. At the same time, Officer Ross was refueling his cruiser at a Texaco gas station directly across Rogers street.

When Officer Ross pulled out of the Texaco station, at approximately 1:34 p.m., he found himself directly behind the Neon. Lee was driving the Neon and Fell was in the front passenger seat. As the two cars proceeded north along Rogers Street, Officer Ross noted the Neon's passenger, Fell, turning in his seat to look at the cruiser. Ross also noted the Neon's out of state plates and that the car appeared to have two male occupants. The cars drove along Rogers Street for approximately three quarters of a mile. Gov. Ex. 1. During that time, Fell

looked at the cruiser approximately six to eight times. Ross noticed that Fell's glances coincided with intersections and entrances to stores. Thus, it appeared to Ross that Fell was checking to see if the cruiser was continuing to follow the Neon.

At the intersection of Rogers Street and Poplar Street, the Neon turned right onto Poplar Street. Ross, who was nearing the end of his shift, had been intending to continue along Rogers street and return to the station. As the Neon turned, Ross noticed that Fell was looking through the passenger window at the cruiser and, as the car turned further, Fell twisted in his seat to watch the cruiser through the Neon's back window. Finding this behavior unusual, Ross decided to follow the Neon. At that point, Ross was already most of the way through the intersection so he had to turn very sharply onto Poplar requiring him to cut over Poplar's left turn lane.

At approximately 1:38 p.m., as the vehicles continued along Poplar Street, Ross called dispatch for a "10-51" on the Neon's Pennsylvania license plate. Gov. Ex. 3. A 10-51 is a request for the dispatcher to check with the National Crime Information Center ("NCIC") database to see whether to plate is stolen. Dispatch replied that the plate was stolen.

After the plates were run, the Neon turned left onto Meadow Lane. Meadow Lane is a smaller road than Poplar Street which is

itself a more minor road then Rogers Street. Thus, Ross noted that the Neon was turning onto successively more minor roads in an apparent attempt to get out from in front of the cruiser. As the cars drove along Meadow Place, Ross decided to stop the Neon. Ross wanted to stop the Neon in a relatively open area. He believed this would be safer and it would be harder for the occupants to flee.

Ross followed the Neon along Meadow Place until they reached a relatively open area near a park. Ross activated his lights and the Neon continued north for approximately 30 or 40 yards then turned into the parking lot of a small church. The Neon pulled into a parking space in this lot and Ross stopped his cruiser behind it. Ross stood behind the driver-side door with his weapon drawn and ordered the driver, Lee, out of the car. Ross asked Lee to put his hands in the air and walk backwards towards him. Ross then handcuffed Lee and placed him in the backseat of the cruiser.

After securing Lee, Ross moved behind the front passenger-side door of the cruiser. With his weapon drawn, he asked Fell to exit the vehicle, raise his hands and move backwards toward him. Ross then handcuffed Fell. As Fell exited the vehicle, Ross noticed the similarities between the Neon's occupants. Both Fell and Lee were young white males, they had similar height and build and they wore similar dark clothing and black

T-shirts. Also, both Lee and Fell were unshaven and disheveled.

Around this time, Ross heard backup approaching. Ross had Fell stand near the front of the cruiser and he went up to the Neon to check for potential threats. Ross testified that he wanted to be sure that there were no other passengers in the car. As he looked through the Neon's windows, Ross noticed the stock of a weapon sticking into the passenger compartment. The weapon protruded from the trunk into the passenger compartment over a section of the back seat that was folded down.

At that point, other units began arriving. Ross asked Fell for identification. Fell said that he did not have identification with him but provided his correct name and date of birth and said that he had identification from Pennsylvania. Meanwhile the CPD's Chief Wilson, who had just arrived, asked Lee for identification. Lee provided a Florida driver's license. At approximately 1:45 p.m., dispatch informed Ross that Pennsylvania identification existed for Donald Fell.

Fell was placed in one of the newly arrived cruisers and Ross and Wilson began an inventory search of the Neon. This search was conducted pursuant to a CPD policy directing that an officer shall inventory the contents of any vehicle taken into custody by the CPD. Gov. Ex. 4. Ross removed the weapon from the vehicle. The weapon was a 12 gauge Mossburg shotgun. At the same time, approximately 1:47 p.m., Wilson checked the glove

box and found a Vermont registration certificate showing that the vehicle belonged to Teresca and Norman King of Clarendon, Vermont. The officers compared the vehicle identification number on the registration with the number underneath the windshield and noted that they matched. Ross also found two drug pipes in the compartment between the front seats. These pipes both appeared to be used and were covered with marijuana residue. Ross also found a knife in a compartment on the passenger-side door.

At approximately 2:18 p.m., Fell was taken to the Johnson County Detention Center in Clarksville. At 2:20 p.m., Pennsylvania officials informed CPD dispatch that the report on the plates found on the Neon was "active" meaning the plates had been reported lost or stolen the prior night. Gov. Ex. 3. Fell and Lee were interviewed by the FBI later that evening and the following morning.

II. Discussion

Fell challenges the legality of both the stop of the Neon and his subsequent arrest. Under Wong Sun v. United States, 371 U.S. 471 (1963), Fell seeks suppression of all evidence and statements that are "fruits" of either the stop of the car or his arrest. Fell is not entitled to the suppression of this evidence, however, as both the original stop and the arrest were legal.

A. The Legality of the Stop

An officer "seizes" a vehicle and its occupants within the meaning of the Fourth Amendment whenever he or she activates a cruiser's overhead lights and stops the vehicle. See Brown v. City of Oneonta, N.Y., 221 F.3d 329, 340-41 (2d Cir. 2000). An officer must have at least "reasonable suspicion" to initiate such a traffic stop. Delaware v. Prouse, 440 U.S. 648 (1979).

In this case, it is clear that Ross had sufficient grounds to stop the Neon. Prior to stopping the Neon, Ross had been informed by dispatch that a check of the NCIC database showed that the Neon's license plates were stolen. Given this, it would have been remarkable for Ross not to stop the vehicle. Possession of stolen plates is an offense. Moreover, as Ross testified, stolen license plates frequently conceal further crimes. Ross testified that in his experience as a police officer, stolen plates are typically found on stolen cars. This is a common sense assumption that Ross was entitled to make.

Fell argues that Ross should have waited until dispatch confirmed the NCIC "hit" with Pennsylvania authorities. After doing the initial 10-51 check, the CPD dispatcher contacted Pennsylvania authorities at 1:42 p.m. and 2:02 p.m. for a "hit confirmation." Gov. Ex. 3. This means that the dispatcher was checking with Pennsylvania authorities to ensure that the information from the NCIC database was still current.

Pennsylvania authorities responded with a "hit confirmation" at 2:20 p.m. reporting that the plate was entered as lost or stolen overnight. Id.

Officer Ross was entitled to rely on the initial report from the dispatcher. The fact that the plate was entered as stolen in the NCIC database gave Ross a very good reason to assume that the plates were stolen. Moreover, this information also gave Ross grounds to suspect that the Neon was stolen. Although the dispatcher tried to get further confirmation from Pennsylvania, Ross, who was faced with mobile suspects showing signs of nervousness, was fully justified in acting immediately.

B. Officer Ross Had Probable Cause to Arrest Fell

After stopping the Neon, Ross drew his weapon and required Fell to leave the vehicle. Ross then placed Fell in handcuffs. Fell claims that this was an illegal arrest. The government argues that Ross had probable cause to arrest Fell. Upon review of the evidence, the Court finds that Ross had probable cause to arrest Fell when he was first placed in custody.

Probable cause is a "fluid concept" that turns "on the assessment of probabilities in particular factual contexts." Illinois v. Gates, 462 U.S. 213, 232 (1983). The Supreme Court has not defined probable cause in terms of an exact percentage. See Maryland v. Pringle, 540 U.S. 366, 371 (2003). Rather, the "substance of all the definitions of probable cause is a

reasonable ground for belief of guilt . . . and that the belief of guilt must be particularized with respect to the person to be searched or seized." Id. (citing Ybarra v. Illinois, 444 U.S. 85, 91 (1979) (internal quotation marks omitted); see also United States v. Gagnon, 373 F.3d 230, 236 (2d Cir. 2004).

Here, Officer Ross had sufficient grounds to believe that Fell had committed an offense. The following facts supported Ross' belief: (1) Fell was the sole passenger in a car bearing stolen plates from a distant state; (2) Fell had shown a high level of nervousness about the presence of the cruiser; (3) the Neon likely belonged to neither occupant; (4) Ross first saw the Neon close to the interstate; (5) the Neon's progressive turns onto smaller side streets made it appear the occupants were interested in getting out from in front of the cruiser; and (6) Ross observed that Fell and Lee were close in age, appearance, dress and were disheveled and unshaven after their long trip.

Fell's nervous behavior suggested that he was aware of some illegality and had reason to avoid the police. Ross testified that, although it is common for people to look in the direction of a police cruiser, Fell's behavior was unusual because of the frequency of his glances back toward the cruiser and the fact that these glances coincided with intersections. Standing alone, Fell's nervous glances would be insufficient for probable cause. However, once Ross was told that the Neon's plates were

stolen he had strong grounds to suspect Fell was involved in an offense. The distance between Pennsylvania and Arkansas is also significant. This, together with the proximity to the interstate, would have suggested to Ross that the occupants of the car were far from home. Thus, they were unlikely to be on a short trip or simply joyriding. Moreover, the similarity in age and dress between Fell and Lee provided further support for a conclusion that they were working together.

Fell suggests that Ross had no reason to believe that a passenger would know that the vehicle had a stolen plate. By presenting this argument, Fell attempts to invoke a principle established by Ybarra v. Illinois, 444 U.S. 85 (1979). In Ybarra, police officers had obtained a warrant to search a tavern and its bartender. 444 U.S. at 87-88. After arriving at the tavern, the police searched Ybarra, a customer who happened to be present. Id. at 88-89. In holding this search illegal, the Supreme Court held that "a person's mere propinquity to others independently suspected of criminal activity does not, *without more*, give rise to probable cause to search that person." Id. at 91 (emphasis added).

Under Ybarra, Fell's mere proximity to Lee could not, without more, provide probable cause. However, as noted above, Ross' suspicion was based on more than Fell's mere proximity to Lee. In fact, it was Fell's behavior that initially attracted

Ross' attention. Thus, Ybarra is not applicable to the facts of this case.

The Supreme Court's recent decision in Maryland v. Pringle, 540 U.S. 366 (2003) strongly supports this conclusion. In that case, a police officer searched a car and found $763 of rolled-up cash in the glove compartment and five baggies of cocaine placed between the back seat armrest and the seat. Pringle, 540 U.S. at 368. The officer questioned the three occupants of the car and they provided no information regarding the ownership of the drugs or money. Id. at 368-69. At that point, the officer arrested all three occupants of the car. Id. at 369. The front passenger, Pringle, claimed that the officer did not have probable cause to arrest him.

A unanimous Supreme Court held that the officer had probable cause to arrest Pringle. See id. at 372-74. The Court distinguished Ybarra, noting that "Pringle and his two companions were in a relatively small automobile, not a public tavern." Id. at 373. The Court explained that "a car passenger--unlike the unwitting tavern patron in Ybarra--will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing." Id. (quoting Wyoming v. Houghton, 526 U.S. 295, 304-305 (1999)). This shows that Ybarra does not apply when there is evidence that a suspect is engaged in a

common enterprise with someone who is suspected of wrongdoing. See also United States v. Patrick, 899 F.2d 169, 171-72 (2d Cir. 1990).

As noted above, Ross had ample grounds for assuming that Lee and Fell were engaged in a common enterprise. First, rather than simply being present in the same public place, Lee and Fell were traveling together. In fact, given the distance between Pennsylvania and Arkansas and their proximity to Interstate 40, there was reason to believe that they had been traveling together for some time. Second, it was Fell's nervous behavior that had attracted police attention. Thus, there was evidence that Fell had a 'guilty mind' and was involved in the illegal behavior that motivated the driver to try and get out from in front of the cruiser. Overall, Ross had probable cause to arrest Fell when he was first placed in custody.

C. Further Evidence Against Fell Developed Rapidly After His Initial Detention

Ross drew his weapon before asking Fell to step out of the Neon. Ross then handcuffed Fell. Fell argues that this conduct was sufficiently obtrusive to constitute an arrest. As noted above, even if this claim were correct, Ross had probable cause to arrest Fell at the outset. Nevertheless, even if Ross hadn't had probable cause at that point, his initial detention of Fell was proper as an investigatory detention under Terry v. Ohio, 392 U.S. 1 (1968). Further evidence developed shortly after

Fell was detained that justified his subsequent arrest.

During a Terry stop, officers may check for weapons and may take any additional steps "reasonably necessary to protect their personal safety and maintain the status quo during the course of the stop." United States v. Hensley, 469 U.S. 221, 235 (1985). An investigative stop may become an arrest if it lasts for an unreasonably long time or police officers use unreasonable force in executing it. See Dunaway v. New York, 442 U.S. 200, 212 (1979). There is no bright line between a Terry stop and an arrest. In assessing whether the degree of restraint is too intrusive to be classified as an investigatory detention, the Second Circuit considers "the amount of force used by police, the need for such force, and the extent to which the individual's freedom of movement was restrained." United States v. Perea, 986 F.2d 633, 645 (2d Cir. 1993). Specific factors to consider include: (1) the number of agents involved; (2) whether the target of the stop was suspected of being armed; (3) the duration of the stop; and (4) and the physical treatment of the suspect, including whether or not handcuffs were used. Id.

Some of these factors support the conclusion that Ross arrested Fell immediately. Ross did use the intrusive methods of drawing his firearm and placing Fell in handcuffs. Nevertheless, neither of these factors automatically converts Fell's detention into an arrest. See, e.g., United States v.

Esieke, 940 F.2d 29, 36 (2d Cir. 1991) (detention was not an arrest despite use of handcuffs); United States v. Nargi, 732 F.2d 1102, 1106 (2d Cir. 1984) ("A display of guns by the police . . . does not automatically convert a stop into an arrest."); United States v. Harley, 682 F.2d 398, 402 (2d Cir. 1982) ("there is no hard and fast rule concerning the display of weapons").

In this case, the Court places considerable weight on the fact that Ross was alone when he stopped the Neon. The Supreme Court has recognized that "that investigative detentions involving suspects in vehicles are especially fraught with danger to police officers." Michigan v. Long, 463 U.S. 1032, 1047 (1983); see also United States v. Alexander, 907 F.2d 269, 273 (2d Cir. 1990) ("a car-stop is especially hazardous and supports the need for added safeguards"). This is especially true where the officer is alone and outnumbered by the occupants of the car.

Ross was outnumbered by suspects who he had good reason to believe were driving a stolen car. Moreover, Fell had been showing signs of nervousness and the driver had been turning onto successively smaller side streets. Thus, Ross had evidence that the occupants wished to avoid contact with police. In this context, Ross was justified in drawing his weapon and using handcuffs to secure both suspects. See United States v. Miller,

974 F.2d 953, 957 (8th Cir. 1992) (use of handcuffs acceptable during a Terry stop where agents were outnumbered by suspects).

After Ross first placed Fell in custody, he asked him to stand near the front of the cruiser. Ross then looked into the Neon to ensure that nobody else was present. Ross then saw the stock of the Mossburg shotgun. Thus, Fell had only been in custody for a few instants when Ross discovered that Fell and Lee had been armed. This provided justification for leaving Fell in handcuffs as the investigation unfolded. See Muehler v. Mena, 544 U.S. _, slip op. at 6-7 (2005) (use of handcuffs proper while officers searched house for weapons); Perea, 986 F.2d at 645 (court should consider whether the target of the stop was suspected of being armed).

Backup arrived after Ross looked in the Neon. At that time, Ross asked Fell for identification and Chief Wilson asked Lee for identification. Fell told Ross he had identification in Pennsylvania while Lee provided a Florida driver's license. This gave the officers further grounds to suspect Fell. Of the two occupants of the car, only Fell bore identification from the same state as the stolen plates. This reinforced other evidence indicating that Fell was aware that the car bore stolen plates. Moreover, this information arrived very soon after the stop of the car.

Within the next few minutes Ross and Wilson conducted a

search of the Neon. Ross found two drug pipes. Wilson found the car's Vermont registration. This registration showed that the car belonged to Norman and Teresca King of Clarendon, Vermont. The officers then discovered that the vehicle identification number on the registration form matched the number underneath the windshield. Ross and Wilson could then conclude with near certainty that the car was stolen and was from a distant state. In light of this, and the two items of drug paraphernalia, the evidence of joint involvement was overwhelming. There is no question that the officers had probable cause to arrest Fell at that time.

Although the Court holds that Ross had probable cause at the outset, Fell's initial detention in handcuffs was also justified as a Terry stop in light of Ross' safety concerns. After Ross saw the shotgun, it was reasonable to leave Fell in handcuffs as the investigation unfolded. Thus, the officers did not use unreasonable force in detaining Fell. Moreover, the officers had very strong additional evidence within a few minutes. This means that the Terry detention did not last for an unreasonable duration. Thus, even if Ross did not have probable cause at the outset, Fell was properly detained until additional evidence developed justifying Fell's arrest.

D. The Search of the Neon and Fell's Statements

Fell has no basis to challenge the search of the Neon.

Generally, to have standing to contest a search, a defendant must have a legitimate expectation of privacy in the thing that was searched. See, e.g., Rakas v. Illinois, 439 U.S. 128 (1978). The Second Circuit has made it very clear that a defendant does not have standing to contest the search of a stolen car. United States v. Tropiano, 50 F.3d 157, 161 (2d Cir. 1995) ("we think it obvious that a defendant who knowingly possesses a stolen car has no legitimate expectation of privacy in the car"). Thus, Fell does not have standing to *directly* challenge the propriety of the search.[1]

The only way Fell can contest the search is to argue that the stop of the car was illegal and the search is a fruit of the stop. See, e.g., United States v. Ameling, 328 F.3d 443, 447 n.3 (8th Cir. 2003) (passenger may "still challenge the stop and detention and argue that the evidence should be suppressed as fruits of illegal activity") (quotation marks and citation omitted). However, as noted above, the stop was legal. Thus, Fell has no basis to seek suppression of the results of that search.

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[1]Even if Fell did have standing, he would not be entitled to the suppression of evidence seized from the Neon. This is because the search of car was valid under three different rationales: (1) as an inventory search, see Colorado v. Bertine, 479 U.S. 367 (1987); (2) a search incident to arrest, see New York v. Belton, 453 U.S. 454 (1981); and (3) the automobile exception to the warrant requirement, see California v. Carney, 471 U.S. 386 (1985).

Fell has not challenged the voluntary nature of his statements to police and the FBI. Rather, he seeks suppression of these statements under Wong Sun as fruits of the stop of the Neon or his arrest. As the Court has found that both the stop and the arrest were valid, Fell is not entitled to the suppression of his statements.

III. Conclusion

For the foregoing reasons, Fell's motion to suppress evidence and statements (Doc. 48) is denied.

Dated at Burlington, Vermont this 28th day of March, 2005.

/s/ William K. Sessions III
William K. Sessions III
Chief Judge, U.S. District Court